

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

WELLS FARGO EQUIPMENT FINANCE, INC.

Plaintiff,

-v-

**OCTAGON PROPERTIES
LIMITED LIABILITY COMPANY,
Defendant.**

Case No. 14-016240-CK

Hon. Daniel P. Ryan,

14-016240-CK
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CATHY M. GARRETT

OPINION

/s/ Michelle Howard

This matter is before the Court on a Motion for Summary Disposition filed by plaintiff Wells Fargo Equipment Finance, Inc. pursuant to MCR 2.116(C)(9) and MCR 2.116(C)(10). For the reasons stated below, the Court will deny the motion under MCR 2.116 (C) (9) and grant the motion under MCR 2.116 (C) (10).

1. Facts and Procedural History

On October 9, 2007, defendant Octagon Properties (Octagon) executed a promissory note to plaintiff Wells Fargo Equipment Finance, Inc. (Wells Fargo) in the amount of \$3,914,080.83. Under the terms of the note, Octagon was required to make seventy-one monthly installment payments in the amount of \$34,271.36 followed by a final installment of \$1,480,814.27. The note further provided that, in the event of default that Wells Fargo could, upon written notice, "... declare the entire unpaid balance of the Note to be immediately due and payable." The note was amended twice, once on November 1, 2013, and then again on March 1, 2014, extending the term of the contract to seventy-six and then eighty-five months. Under the provisions of the

March 2014 amendment, Octagon agreed to pay nine monthly payments of \$34, 271.36 followed by one final payment of all “unpaid principal together with accrued but unpaid interest.”

Octagon did not make the December 1, 2014 payment required by the note. In a letter dated December 5, 2014, Wells Fargo informed Octagon that the failure to make the payment was an “Event of Default” under the terms of the note and declared the liabilities under the note were immediately due and payable.

On December 22, 2014, Wells Fargo filed a complaint alleging a breach of the promissory note and asserting that, under the terms of the note, it was entitled to the principal indebtedness amount, accrued and unpaid interest, late fees, and attorney fees costs and expenses. Octagon, in its answer, admitted that the December 1, 2014 payment had not been made and the failure to make the payment was an “Event of Default.” Octagon denied, however, that it was required to pay Wells Fargo the principal indebtedness amount, interest, fees and expenses as asserted by Wells Fargo. This matter is before this Court on Well Fargo’s Motion for Summary Disposition pursuant to MCR 2.116(C) (9) and (C) (10).

2. Standard of Review

A motion for summary disposition under MCR 2.116(C) (9), for failure to state a valid defense is tested solely by reference to the pleadings. *Nasser v Auto Club Ins Assn*, 435 Mich 33, 47; 457 NW2d 636 (1990). When a material allegation of the complaint is categorically denied, summary disposition pursuant to MCR 2.116(C) (9) is not proper. *Id* at 47-48 quoting *Pontiac School Dist. V Bloomfield Twp.*, 417 Mich 579, 585; 339 NW2d 465 (1983).

In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), a court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the non-moving party. *Corely v Detroit Bd of Ed*, 470

Mich 274, 278; 681 NW2d 342 (2004). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The moving party has the initial burden of supporting its position through documentary evidence. *Quito v Cross and Peters Co.*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish the existence of a genuine issue of material fact. *Id.* The non-moving party “. . . may not rest upon the mere allegations or denials of his or her pleadings, but must, by affidavit or otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial.” MCR 2.116(G) (4). If the opposing party fails to do so, the motion for summary disposition is properly granted. MCR 2.116(G) (4); *Quito, supra* at 363.

3. Analysis

In this case it is not disputed that Octagon failed to make payment as required by the promissory note and that the failure constituted an Event of Default under the note. See Answer to Complaint paragraphs 5-9; Response to Motion for Summary Disposition. Accordingly, summary disposition on the breach of contract claim is proper because there is no genuine issue of material fact with regard to the failure to make required payments and Wells Fargo is entitled to judgment as a matter of law. MCR 2.116(C) (10); *Maiden, supra*.

As a result of the breach of the promissory note, Wells Fargo, claims that it is entitled to: (a) the principal amount outstanding on the note in the amount of \$1,020,308.39, (b) accrued and unpaid interest in the amount of \$28,322.29, (c) late fees of \$225,077.10, and (d) attorney fees and costs of \$18,125.89 for a total judgment amount of \$1,321,833.67. See Wells Fargo Brief in

Support of Motion for Summary Disposition pp 2-3. Octagon, in its answer to the complaint, denied it was required to pay Wells Fargo the amount of indebtedness including the principal amount, interest, fees and attorney fees.¹ Answer paragraphs 10 and 12. In its response to the motion for summary disposition Octagon asserts that there is a dispute as to the amount of Wells Fargo's damages and attaches an invoice from Wells Fargo dated May 12, 2015, stating an amount different than the total amount sought by plaintiff. The invoice does show a late charge in the amount of \$51,015.42 and an amount due on an aircraft of \$1,020,308.35.

As was noted above, Octagon has admitted the default under the terms of the contract. However, it does not agree with regard to the asserted consequences of the default. The promissory note in this case states, that in the Event of Default Wells Fargo may declare the unpaid balance of the note to be immediately due and payable. The note further provides that: "The undersigned agrees to pay all costs of collection of this Note, including reasonable attorney fees." *Id.*

It is well settled that the language of a contract is given its ordinary and plain meaning. *Michigan Nat'l Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998). If the language of a contract is clear and unambiguous, its construction is a matter of law for the court. *Id.* In this case, the contract clearly states that, in the event of a default, the "entire unpaid balance of the note will be due and payable." Wells Fargo asserts that Octagon owes the principal amount of \$1,020,308.39 plus accrued and unpaid interest, stated to be \$28,322.29 at the time of the filing of the motion for summary disposition. The unpaid balance is properly owed under the terms of the contract and there is nothing before this Court to indicate a genuine issue of material fact concerning the amount owed. In fact, the invoice provided by Octagon, in its response to the

¹ Because Octagon denied such indebtedness in its answer, summary disposition under MCR 2.116(C) (9), failure to state a valid defense is not proper. *Nasser, supra* at 47-48.

motion for summary disposition, lists the same principal amount as being owed.² Octagon has made no argument and provided no documentary evidence that the amount of interest asserted by Wells Fargo is improper. Accordingly, summary disposition is appropriate for the payment of the principal and accrued interest requested by Wells Fargo.

Additionally, the promissory note provides for a late payment fee of 5% on delinquent installments.³ Again, there is no indication from the record or any assertion by Octagon that there is a question of fact as to the amount of the late fee owed. Rather, the invoice provided with Octagon's response lists a late fee amount of \$51,015.42, supporting the conclusion that this amount is proper. Therefore, summary disposition is granted on the claim for late fees of \$51,015.42.

Lastly, Wells Fargo claims that Octagon is responsible for the payment of \$18,125.89 of attorney fees and expenses. In executing the promissory note in this case, Octagon agreed to "... pay all costs of collection of this Note, including reasonable attorney fees." Parties to a contract may include a provision requiring the breaching party to pay the attorney fees of the other party and such provisions are judicially enforceable for reasonable attorney fees. *Zeeland Farm Services, Inc. v JBL Enterprises, Inc.*, 219 Mich App 190, 195-196; 555 NW2d 733 (1996). The party seeking the award bears the burden of establishing that the requested fees are reasonable. *Smith v Khoury*, 481 Mich 519, 528-529; 751 NW2d 472 (2008). A trial court's determination

² Actually, the principal amount claimed by Wells Fargo is \$1,020,308.39 and the invoice shows the amount of \$1,020,308.35. It appears that the four cent difference is due to a typographical error in the complaint and accordingly, the amount of \$1,020,308.35 will be used in this court's calculations.

³ There is a discrepancy between the amount of late fees alleged to be owed in the complaint, \$51,015.42 and the amount of late fees requested in the motion for summary disposition, \$255,077.10. There is no explanation in Wells Fargo's Motion for Summary Disposition as to the reason for the discrepancy. Moreover, the \$51,015.42 amount alleged in the complaint is 5% of the principal amount outstanding on the note and is therefore, consistent with the terms of the note. It is also the amount stated as a late fee on the invoice attached to Octagon's response. Accordingly, it appears that the amount requested in the motion was a misstatement and that the amount of late fees outstanding is \$51,015.42.

of the reasonableness of requested fees begins with an evaluation of the attorney fee customarily charged in the location for similar services. *Id.* at 530. This can be established by testimony or empirical data found in surveys and reports issued by entities such as the State Bar of Michigan. *Id.* at 532. After determining the fee customarily charged in the locality for similar services, the court should determine the “reasonable number of hours expended in the case.” *Id.* at 531. The party seeking the fees must submit detailed billing records in order for the court to determine the reasonableness of the hours submitted. *Id.* at 532. If there is a factual dispute over the rate charged or the hours billed, the party opposing the fee is entitled to an evidentiary hearing to challenge the applicant’s evidence and present any countervailing evidence. *Id.*

In this case, Wells Fargo requests the award of \$18,125.89 in attorney fees and expenses. It presents documentation that, from November 17, 2014 to May 6, 2015, twenty-five hours were spent on the case by a member of the Bodman law firm at an average rate of \$450.80 and that an associate of the firm worked on the case twenty-five hours at the average rate of \$238.87. Wells Fargo also provides the Michigan Bar Journal’s report “The Economics of Law Practice in Michigan” in support of the hourly rate charged. In its response, Octagon makes no argument against the rate charged or the hours billed and provides no evidence that the requested fees are improper.

This Court finds that the rate charged (an average of approximately \$345 an hour) is reasonable in light of fees customarily charged in the location for similar services. This Court also finds that the hours expended in pursuing this matter were reasonable, with the exception of 5.6 hours billed from the period of November 17, 2014 to November 25, 2014, because these charges occurred prior to the December 1, 2014 default on the note.⁴ Octagon has not challenged any of the documentation presented by Wells Fargo in support of its claim for attorney fees and

⁴ These charges total \$2,492.

has not even articulated a reason the fees are inappropriate. Octagon has not met the requirements under MCR 2.116 (G) (4) to demonstrate a genuine issue of material fact on the claim for attorney fees. See *Quito, supra* at 363. Accordingly, summary disposition pursuant to MCR 2.116 (C) (10) is properly granted on the claim for attorney fees resulting from the default.

4. Conclusion

Based on the foregoing this Court **denies** plaintiff Wells Fargo Equipment Finance, Inc.'s motion for summary disposition pursuant to MCR 2.116 (C) (9) and **grants** plaintiff Wells Fargo Equipment Finance, Inc.'s motion for summary disposition pursuant to MCR 2.116(C) (10). Defendant Octagon has not established the existence of any genuine issue of material fact with regard to damages resulting from the breach of contract and Wells Fargo is properly entitled to \$1,115,279.95 based upon: (1) the principal amount of \$1,020,308.35; (2) accrued and unpaid interest of \$28,322.29; (3) late fees of \$51,015.42 and (4) attorney fees and expenses of \$15,633.89.